

JUDGE CROTTY

13 CIV 3484



COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SKIL-CARE CORPORATION

Plaintiff,

v.

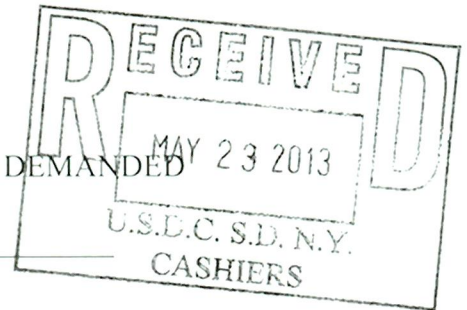
N.Y. ORTHOPEDIC USA, INC.

Defendant.

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JURY TRIAL DEMANDED

Civ. No. _____

COMPLAINT

Plaintiff Skil-Care Corporation (“Skil-Care”), for its Complaint against N.Y. Orthopedic USA, Inc. (also known as NYOrtho and referred to herein as “NYOrtho” or “Defendant”), states and alleges as follows:

NATURE OF THE ACTION

1. This is an action to enjoin and collect damages stemming from NYOrtho’s acts of trade dress infringement under 15 U.S.C. § 1125(a) (also known as § 43(a) of the Lanham Act) for the manufacture, sale, and/or distribution of the NYOrtho Zero-G boot (also known as the NYOrtho Heel Boot, Heel Protector, and/or Suspension Boot) (collectively “the Accused Product”); acts of trade dress infringement under the statutory and common law of the State of New York; and acts of unfair competition under the statutory and common law of the State of New York.

2. As alleged and pleaded herein, Defendant has infringed and is infringing Skil-Care’s trade dress rights and has unfairly competed through its activities regarding heel boots, including without limitation the Accused Product. Such unlawful activities are occurring throughout the United States and, in particular, the Southern District of New York.

3. As set forth more fully herein, NYOrtho manufactures, sells, and distributes the Accused Product, a heel boot that is confusingly similar in design, appearance, and configuration to a heel boot manufactured and sold by Skil-Care.

4. NYOrtho's unauthorized use of Skil-Care's trade dress is an effort to trade on the valuable goodwill and reputation associated with Skil-Care's trade dress, and is likely to cause confusion with regard to an affiliation or connection between NYOrtho and Skil-Care.

Moreover, NYOrtho's unauthorized use of Skil-Care's trade dress is likely to cause confusion with regard to the source, sponsorship, and/or approval of NYOrtho's products, to Skil-Care's harm and NYOrtho's unjust enrichment. NYOrtho's misappropriation of Skil-Care's trade dress is an intentional act(s) designed to pass off NYOrtho's products as Skil-Care's high quality products by deceiving the relevant public, including consumers, and to unfairly compete with Skil-Care's established products and business.

THE PARTIES

5. Plaintiff Skil-Care is incorporated under the laws of New York, and has a place of business at 29 Wells Avenue, Yonkers, NY 10701.

6. Since 1978, Skil-Care has been designing, manufacturing, and selling healthcare products for hospitals and other healthcare facilities worldwide, including, but not limited to, heel boots. Skil-Care's products are available to consumers for home use and may be purchased at drug stores, discount retailers, or online. Skil-Care's products are also available to healthcare facilities and have been routinely purchased, for almost thirty-five years, by such facilities for widespread use around the United States. Skil-Care maintains a vast distribution network across the United States, as evidenced by the dealer locator function available at www.skil-care.com/dealer.shtml.

7. Defendant NYOrtho is incorporated in New York and has a place of business at 63 Flushing Ave, Brooklyn, NY 11205.

8. Upon information and belief, NYOrtho manufactures and/or sells patient aid products, including heel boots, used in the health care industry, e.g., in hospitals, nursing homes, long-term care facilities, and similar facilities, or for purchase by individual consumers. NYOrtho manufactures, uses, offers for sale, distributes, sells, and/or imports the Accused Product, which has been offered for sale and sold within the United States and, in particular, the Southern District of New York.

JURISDICTION AND VENUE

9. This is an action for trade dress infringement under 15 U.S.C. § 1125(a). This Court has subject matter jurisdiction over Skil-Care's federal claims of trade dress infringement pursuant to 28 U.S.C. §§ 1331 and 1338(a).

10. This Court has personal jurisdiction over Defendant for the purposes of this action at least because Defendant resides in this District or sells and/or offers to sell the Accused Product in this District.

11. NYOrtho's website also provides online buttons, available at nyorthousa.com, for the public to submit questions regarding its products, including its heel products and heel boots, or to find retailers, thereby injecting the Accused Product into the stream of commerce in this District.

12. Venue is proper in this District under 28 U.S.C. § 1391 because at least a substantial part of the events giving rise to Skil-Care's claims occurred in the Southern District of New York and because Defendant, a New York corporation, is subject to personal jurisdiction in the Southern District of New York.

13. A real, immediate, and justiciable controversy exists between Skil-Care and Defendant relating to the infringement and/or willful infringement of Skil-Care's trade dress.

SKIL-CARE'S HEEL FLOAT TRADE DRESS

14. Since at least November 2002, Skil-Care has designed, manufactured, distributed and/or sold in interstate commerce the Skil-Care Heel Float product shown below (herein "Skil-Care's Heel Float"):



Skil-Care's Heel Float

15. Skil-Care's Heel Float includes unique, arbitrary, and non-functional characteristics, including the use of a powder blue color for the main boot portion, dual straps in the same powder blue color, and white loops on the leg and foot engaging portions. Skil-Care has used and continues to use the same color in other products, such as Skil-Care's Foot/Heel Elevator and Skil-Care's Cozy Cloth Foam Heel Cushion, shown below:



Skil-Care's Foot/Heel Elevator



Skil-Care's Cozy Cloth Foam Heel Cushion

16. The design, appearance, and configuration of Skil-Care's Heel Float include, but are not limited to, the above-referenced unique and arbitrary features, individually and in combination with one another.

17. Skil-Care has expended substantial time, effort, and money in advertising, promoting, and marketing Skil-Care's Heel Float, including the Heel Float trade dress, throughout the United States. For example, Skil-Care promotes its Heel Float via its website, www.skil-care.com, and in catalogs, brochures, and other promotional items sent each year to customers throughout the United States, dating back to the product's introduction in November

2002. Moreover, established medical supply dealers, such as Direct Supply, Inc. and McKesson Corp., have promoted Skil-Care's Heel Float throughout the country on their websites and in their brochures. Such promotional items typically include photographs or depictions of Skil-Care's Heel Float, including the Heel Float trade dress. Skil-Care also maintains a vast distribution network across the United States, as evidenced by the dealer locator function available at www.skilcare.com/dealer.shtml. Skil-Care's sales of its Heel Float throughout the United States have been substantial, as measured by geographic scope, unit sales, and/or dollar sales.

18. As a result of Skil-Care's substantial, continuous, and extensive advertising, promotion, distribution, and sales of its Heel Float for over a decade, the Heel Float trade dress has acquired secondary meaning such that the relevant public, including consumers, is able to identify and distinguish Skil-Care's Heel Float from goods offered by other companies due to Skil-Care's well-established trade dress in the Heel Float product. As a further result, the Heel Float trade dress has come to acquire valuable goodwill and has gained acceptance and recognition throughout the United States as identifying Skil-Care or, in the alternative, at least a single source.

**NYORTHO'S UNAUTHORIZED COPYING, USE, AND EXPLOITATION
OF SKIL-CARE'S TRADE DRESS IN THE HEEL FLOAT PRODUCT**

19. NYOrtho and Skil-Care directly compete with one another in the marketplace for heel products, including heel boots.

20. On information and belief based on publicly-available catalogs from at least 2010, and other information, NYOrtho began advertising and offering for sale in interstate commerce the Accused Product, a heel boot that directly competes with Skil-Care's Heel Float.